Office - Supreme Court, U.S.
FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2294

In the Supreme Court of the United States

OCTOBER TERM, 1982

MATTHEW MADONNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JAMES G. LINDSAY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim that he was justified in refusing to testify before a grand jury despite a court order immunizing him and compelling him to testify, pursuant to 18 U.S.C. 6001 *et seq.*

[THIS PAGE INTENTIONALLY LEFT BLANK]

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Blair v. *United States*, 250 U.S. 273 4

Branzburg v. *Hayes*, 408 U.S. 665 4

Brown v. *United States*, 245 F. 2d 549 7

Fula, In re, 672 F. 2d 279 4

Gruberg, In re, 453 F. Supp. 1225 5

Stolar, In re, 397 F. Supp. 520 5

United States v. *Calandra*, 414 U.S. 338 4

United States v. *Dien*, 598 F. 2d 743 6

United States v. *Doe*, 475 F. 2d 895, cert. denied, 410 U.S. 941 5

United States v. *Fisher*, 455 F. 2d 1101 7

United States v. *Icardi*, 140 F. Supp. 383 7

United States v. *Madonna*, 556 F. 2d 562, cert. denied, 434 U.S. 919 2

United States v. *Mandujano*, 425 U.S. 564 6

United States v. *Thayer*, 214 F. Supp. 929 7

Page

Cases—Continued:

United States v. *Wilson*, 421 U.S. 309 6

Wood v. *Georgia*, 370 U.S. 375 4

Statutes:

18 U.S.C. 6001 *et seq.* 2

21 U.S.C. 812 ..... 1, 2

21 U.S.C. 841(a)(1) 1, 2

21 U.S.C. 841(b)(1)(A) 1, 2

21 U.S.C. 952(a) 1

28 U.S.C. 1826(a) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2294

MATTHEW MADONNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The district court did not issue a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1982. The petition for a writ of certiorari was filed on June 14, 1982 (backdated to May 20, 1982). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. In 1976, after a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to import, distribute and possess heroin, in violation of 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A) and 952(a), and of distribution of the drug and possession of it with intent to distribute, in violation of 21

U.S.C. 812, 841(a)(1) and 841(b)(1)(A). Petitioner was sentenced to 15 years' imprisonment and a $25,000 fine on each count. The sentences of imprisonment were to run consecutively, for a total term of 30 years, to be followed by a special parole term of three years. The convictions were upheld on appeal. *United States* v. *Madonna*, 556 F. 2d 562 (2d Cir.), cert. denied, 434 U.S. 919 (1977).

2. On January 21, 1982, while petitioner was imprisoned in connection with his criminal conviction, he was summoned to testify before a federal grand jury sitting in the Southern District of New York. The grand jury was convened to investigate the relationship among major drug figures (Pet. App. 2a). After responding to a request that he identify himself, petitioner inquired about the purpose of the grand jury investigation. The prosecutor explained the purpose of the investigation and the nature of the information that would be sought from petitioner. Petitioner then invoked his privilege against self-incrimination and refused to answer questions. The government thereafter applied for an order immunizing petitioner and compelling him to testify before the grand jury, pursuant to 18 U.S.C. 6001 *et seq.*, which was issued by the district court on February 17, 1982 (Tr. 2-3).[1]

On March 16, 1982, petitioner again appeared before the grand jury. He again invoked his privilege against self-incrimination and refused to answer questions about his employment and source of income and whether he knew certain individuals (Tr. 3-12). The prosecutor then conferred immunity upon petitioner by giving him a copy of the order previously issued by the district court (Tr. 12-13).

---

[1] "Tr." refers to the sealed transcript of the contempt proceeding before the district court, dated March 16, 1982.

After consulting with counsel, petitioner returned to the grand jury room and confirmed that he would persist in refusing to answer questions (Tr. 13-17).

Later that day the parties appeared before the district court, and the transcript of the day's grand jury proceedings was read into the record. Counsel for petitioner raised a number of claims, including those advanced before this Court, in an effort to demonstrate "just cause" for petitioner's failure to comply with the court's order.[2] The district court heard argument on these claims and concluded that petitioner's contentions concerning the grand jury proceeding were "unsupported [and] entirely conclusory" (Tr. 28). After ascertaining that petitioner intended to persist in his refusal to testify before the grand jury, the district court found petitioner in civil contempt and ordered that he be confined until he complied with the order, or for the life of the grand jury, but not longer than 18 months. The district court also stayed the running of petitioner's sentence on his criminal conviction for the period during which he remained in civil contempt (Tr. 28-30).

The court of appeals upheld the district court's adjudication of civil contempt (Pet. App. 1a-4a). It noted that a recalcitrant witness has no standing to take exception to the jurisdiction of the grand jury over the particular subject matter under investigation; that petitioner had presented no basis for impeaching use of the grand jury to investigate the relationship among major drug figures; and that the government is not required to make a preliminary showing that a witness will provide vital information before he is required to appear before a grand jury (*id.* at 2a-3a). The court of appeals rejected as unsupported and unrealistic

---

[2]See 28 U.S.C. 1826(a).

petitioner's claim that the grand jury was being used as a "contempt trap" to increase his term of imprisonment (*id.* at 3a-4a).

ARGUMENT

Both the district court and the court of appeals rejected the claims raised by petitioner. The decisions of the courts below are clearly correct, and no further review by this Court is warranted.

1. Petitioner first contends (Pet. 7-10) that the grand jury was being used solely as an intelligence-gathering tool for the Federal Bureau of Investigation. Petitioner cites in support of this contention the prosecutor's statement that the grand jury's investigation encompassed petitioner's past activities in the narcotics field and relationships with others, that the Drug Enforcement Administration and the United States Attorney's office had some information on those subjects, and that the general purpose of the grand jury's inquiry was to gain additional intelligence about those subjects (Tr. 7-8).[3]

Petitioner's contention is without merit. Of course, the traditional role of the grand jury is in part investigatory. See *United States* v. *Calandra*, 414 U.S. 338, 344 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 700-702 (1972); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). As the court of appeals noted (Pet. App. 2a), a recalcitrant witness has no standing to take exception to the grand jury's jurisdiction over the matter under investigation. See, *e.g.*, *In re Fula*, 672 F. 2d 279, 283 (2d Cir. 1982). See also *Blair* v. *United States*, 250 U.S. 273, 282 (1919) (grand jury witness not entitled to urge objections of incompetency or irrelevancy).

---

[3]Petitioner stresses the prosecutor's use of the word "intelligence." It is clear from the context that the prosecutor used that term as synonymous with "knowledge" or "information."

Nor is the government required to make a preliminary showing that its request for appearance of a particular witness is reasonable. See *United States* v. *Doe*, 457 F. 2d 895, 898 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973).

Moreover, there is no ground for petitioner's contention that the grand jury was not seeking information that might lead to an indictment but rather was being used as an "arm of the FBI." Petitioner apparently interprets the prosecutor's statement concerning the scope of the investigation to mean that the grand jury had called him with the sole purpose of adding to FBI intelligence files and not with any purpose of gathering information that would assist the grand jury in determining whether criminal conduct had occurred (Pet. 10).[4] This is an implausible interpretation, which the district court correctly found to be "unsupported" and "entirely conclusory" (Tr. 28). The court of appeals concluded that the grand jury had been convened "to investigate the relationship among major drug figures, some of whom had been previously convicted" and that petitioner had no basis for impeaching use of the grand jury for this function (Pet. App. 2a). It is clear that the grand jury

---

[4]Petitioner seeks to analogize this case to *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975). In *Stolar* the court found an abuse of the grand jury process in the subpoena of an attorney to appear before a grand jury in order to compel him to disclose the address and telephone number of his client. The court concluded that the information apparently was not needed for the grand jury investigation, but was requested solely so that it could be turned over to the FBI. In the present case, unlike *Stolar*, there is no indication that the FBI is in any way involved in the decision to call petitioner before the grand jury or that any information developed by the grand jury will ever be transmitted to the FBI or to any other federal agency. Moreover, given petitioner's past involvement in the narcotics business, there is every reason to believe that his answers to the questions posed would yield information that could result in indictments by the grand jury. The *Stolar* case, which has been limited to its own particular facts (*e.g.*, *In re Gruberg*, 453 F. Supp. 1225, 1233 (S.D.N.Y. 1978)), clearly has no application here.

was properly investigating aspects of the narcotics business and that petitioner's background made it reasonable to expect that he might provide information leading to one or more indictments. See *United States* v. *Mandujano*, 425 U.S. 564, 573 (1976) (Burger, C.J.). As both courts below found, there is no basis whatsoever for petitioner's assertion that the grand jury was being used improperly.

2. Petitioner also argues that the other "real" purpose of requiring his testimony was to force him into contempt and thereby lengthen his term of imprisonment (Pet. 11-15).[5] In support of this theory, petitioner simply asserts that because he had not, during his past years of imprisonment, sought voluntarily to provide information to the FBI, the prosecutor must have known that he would never give such information (Pet. 10, 11-12). This allegation is wholly unsupported. Nothing in the record indicates that the government believed that petitioner would refuse to testify when ordered to do so by a court or that its motivation in calling him to testify was to add to the length of his term of imprisonment.[6] The court of appeals perceived "no basis"

---

[5]There is nothing improper in the district court's decision to suspend the running of the sentence for petitioner's criminal conviction during the time of his confinement for contempt. See, *e.g.*, *United States* v. *Wilson*, 421 U.S. 309, 321 n.2 (1975) (Blackmun, J., concurring); *United States* v. *Dien*, 598 F. 2d 743, 744 (2d Cir. 1979); *id.* at 745 n.1 (citing decisions of seven other circuit courts supporting a federal court's power to stay a prior federal criminal sentence pending confinement for contempt). Of course, if the confinement for contempt were to run concurrently with petitioner's sentence, he would have no incentive to purge himself of the contempt by agreeing to testify. See *United States* v. *Dien*, *supra*, 598 F. 2d at 744.

[6]Petitioner faults the prosecutor for explaining (Pet. 9, quoting Tr. 26-27):

> Being aware of [petitioner's] background, being aware of the type of activity he has been involved in over the years, being aware of the number of people that he has associated with and with whom he has been convicted, it occurs to me that I might reasonably say

for petitioner's allegation and found it inexplicable that, after petitioner had spent six years in prison, the government would suddenly initiate the complicated grand jury process merely to add 18 months to petitioner's 30-year sentence (*id.* at 3a-4a). The court of appeals correctly rejected petitioner's claim.[7]

---

to myself, your Honor, this man is doing 30 years in jail. Maybe he wants to do something about it. That's why he was called before the grand jury.

The clear import of those words is that the prosecutor hoped that petitioner would respond to the grand jury's questions with helpful information.

[7]The cases cited by petitioner in support of his argument are inapposite. In *United States* v. *Fisher*, 455 F. 2d 1101, 1105 (2d Cir. 1972), the court criticized the government's use of the grand jury to "freeze" the testimony of a potential witness. No such use is even alleged here. The other cases cited by petitioner involve perjury prosecutions in which the government apparently had requested a witness's testimony solely for the purpose of causing the witness to contradict or perjure himself. See *Brown* v. *United States*, 245 F. 2d 549, 555 (8th Cir. 1957); *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo. 1963); *United States* v. *Icardi*, 140 F. Supp. 383 (D.D.C. 1956). Again, in this case no such use of the grand jury is alleged, much less proved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JAMES G. LINDSAY
Attorney

SEPTEMBER 1982

DOJ-1982-09